SUPREME COURT, U.S.
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No. 91-2062

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES E. GAVETTE, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in granting summary judgment to respondent on petitioner's claim of employment discrimination based on petitioner's failure to raise a genuine issue of fact with respect to a viable theory of discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 71-78)[1] is unreported, but the judgment is noted at 951 F.2d 349 (Table). The opinion of the district court (Pet. App. 1-14) is unreported. The opinion of the Merit Systems Protection Board (Pet. App. 236-303) is reported at 44 M.S.P.R. 166.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1991. The petition for a writ of certiorari

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[1] For convenience, we refer to the unnumbered pages of the appendix as if they were numbered consecutively.

was filed on March 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. While petitioner was employed by the IRS, he became disabled by mental illness for two periods (1979-1982 and 1985-1986). Because he believed that the IRS had discriminated against him during those periods on the basis of age and handicap, by failing to notify him of promotional rights and consider him for promotion in violation of 5 U.S.C. 8151, he sought relief from the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC). Pet. App. 6-7, 72; see 5 U.S.C. 7701(a); 42 U.S.C. 2000e-5(b).

2. The EEOC denied petitioner relief and notified him of his right to sue in federal district court. See 42 U.S.C. 2000e-5(f)(1). Before the MSPB reached a decision, petitioner filed the present action in federal district court.[2] The district court deferred action on respondent's motion for summary judgment pending the MSPB's decision.

3. The MSPB rendered a final decision in March 1990. Pet. App. 236-303. This decision concluded that the IRS had violated 5 U.S.C. 8151 by failing to give petitioner adequate consideration for competitive promotions. Pet. App. 262-276. On the other hand, the MSPB concluded that petitioner had failed to meet his burden of proving

[2] Despite the pending MSPB proceeding, this was permissible, because the Board failed to reach a decision within the statutorily specified 120 days. See 5 U.S.C. 7702(e)(1)(B). Because petitioner's litigating position has not been clearly articulated, it is not clear whether this action challenges the EEOC determination or the later MSPB determination. Thus, the court of appeals noted that "it appears that [petitioner] is suing pursuant to his right to sue letters from the EEOC agency," but also explained that petitioner's "counsel agreed that the only issue on appeal was as to the [IRS's] compliance with the MSPB order." Pet. App. 74 n.1.

handicap discrimination because he failed to show that he was a qualified, handicapped individual. *Id.* at 279-283. The opinion explained that if petitioner was unsatisfied with the agency's compliance with the MSPB's order, he should "file a petition for enforcement * * * within 30 days of the agency's notification of compliance." *Id.* at 289-290.

4. In response to this order, respondent notified petitioner that he was ineligible for promotion because he had not filled out the Form 4536 or "interest card"[3] during the relevant period. The notice advised petitioner that, in the IRS's view, the notice constituted compliance with the order of the MSPB. Pet. App. 10-11. Petitioner did not challenge this notice within thirty days.[4]

5. The district court granted summary judgment for the IRS. Pet. App. 1-14. At the hearing on the summary judgment motion, petitioner's counsel agreed with the court's conclusion that "the argument really is over whether or not there was compliance [with the MSPB order]." *Id.* at 4. The court then observed that "there is a procedure * * * for allowing * * * the Board to determine whether or not there was compliance and nobody has taken that [within the prescribed time limit]." *Id.* at 5. The court then noted that "[f]ailure to raise the issue of non-compliance with the [MSPB] may constitute abandonment of [petitioner's] claim." *Id.* at 11. Finally,

[3] An essential element of respondent's merit promotion plan is submission in advance of a written expression of interest in the position sought, either for a particular vacancy or continuously for a particular position.

[4] Petitioner challenged the IRS's action in a petition for enforcement of the MSPB's order filed with the MSPB on January 19, 1991, 227 days beyond the 30-day period. The Administrative Law Judge dismissed the petition on April 16, 1991, in decision No. CH035388C0382. Because petitioner did not file a timely petition for review with the MSPB, the decision is now final.

it concluded that "[w]hether or not the action of the IRS complies with the orders of the [MSPB] is for the * * * Board in the first instance to determine." *Id.* at 12. Accordingly, the court granted summary judgment for the IRS "without prejudice to the rights of [petitioner] to apply to the [MSPB] for further relief regarding enforcement of its order." *Id.* at 13.[5] Additionally, the court noted that "there is nothing in the record to suggest the IRS treated on-the-job employees any differently then [*sic*] those on disability leave regarding promotional opportunities." *Id.* at 12.

6. The court of appeals affirmed in an unpublished opinion. Pet. App. 71-78. Acknowledging the lack of clarity in petitioner's presentation, it concluded that "it appears that" petitioner's case was challenging the EEOC determination, not the MSPB determination. *Id.* at 74 n.1. It noted the district court's holding that "there was no evidence in the record of discrimination against [petitioner]." *Id.* at 73. Based on its "examination of the record on appeal," *id.* at 75, the court agreed with the district court's conclusion. The court noted petitioner's argument that he did not receive certain notices provided able-bodied employees, but concluded that this "is not the theory upon which [petitioner] proceeded in the trial court." *Id.* at 76-77. Alternatively, it pointed out that petitioner did not "point out evidence demonstrating that on-the-job able-bodied employees received [the] advice" in question. *Id.* at 77. The court agreed that the IRS did "post notices on a bulletin board at the workplace," but noted that petitioner "failed periodically to check the posted notices or call the office of personnel management for promotion information." *Id.* at 77-78. Hence,

[5] As noted above, petitioner subsequently sought further relief, but was unsuccessful because of his failure to comply with MSPB filing deadlines. See note 4, *supra*.

"because [petitioner] did not posit to the district court a viable theory of discrimination supported by summary judgment evidence," the court of appeals affirmed. *Id.* at 78.

ARGUMENT

1. Petitioner first argues (Pet. 12-26, 29-32) that evidence suggesting that the IRS failed to comply with certain notification requirements adequately supported his claims of discrimination on the basis of handicap. He does not address, however, the finding of the MSPB that he failed to show that he was a qualified, handicapped individual. See Pet. App. 279-283. Nor does he offer any reason to believe that the lower courts' conclusion that petitioner has offered no substantial evidence of discrimination raises a substantial legal question of general significance.

2. Petitioner also argues (Pet. 26-29) that, even if the IRS did not discriminate against him on the basis of handicap, he is entitled to relief based on the IRS's affirmative obligation to accommodate the handicapped. This argument was not adequately presented to the court of appeals and thus was not considered by that court. See Pet. App. 74 n.1 (discussing the lack of clarity in petitioner's arguments to the court of appeals). Accordingly, it is not properly before this Court. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991).

3. Finally, in his supplemental brief, petitioner argues that the IRS did not adequately comply with the MSPB's Order. He does not, however, contest the district court's conclusion (Pet. App. 11-12) that the district court had no authority to entertain that claim. Accordingly, that argument does not suggest that the

district court erred in granting summary judgment for the IRS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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